



**Review under Section 61(4) of the Police (Northern  
Ireland) Act 1998**

**6<sup>th</sup> November 2020**

## **FOREWORD BY THE POLICE OMBUDSMAN**

1.1 By virtue of section 61(4) of the Police (NI) Act 1998 ('the 1998 Act') the Police Ombudsman for Northern Ireland ('the Police Ombudsman') is required to -

- (a) keep under review the working of Part VII of the 1998 Act; and
- (b) at least once every five years, make a report on it to the Department of Justice.

1.2 This report is compiled as my first Review of the Police Ombudsman's legislation to be submitted in accordance with section 61(4) of the 1998 Act.

1.3 The former Police Ombudsman Dr Michael Maguire submitted his Review under section 61(4) of the 1998 Act to the Department in January 2019. A copy of his recommendations is attached at Appendix A to this report. At that time the recommendations could not be taken forward due to the suspension of the Northern Ireland Assembly (the Assembly). The Assembly has now resumed since January 2020 and the New Decade New Approach programme for government provides a fresh opportunity to look at the legislation underpinning the work of the Office. I have considered the 2018 review by Dr Maguire and found it a useful foundation for this report.

1.4 I have undertaken this at the beginning of my tenure to coincide with the Minister for Justice's '*stock take*' exercise for the Department's arms-length bodies and this review will be considered by the Minister as part of that stock take. Having undertaken an internal desktop review of the 1998 Act and related legislation, I have decided to set out my recommendations for consideration by the Department at the earliest opportunity. I am required by section 61(5) of the 1998 Act to forward a copy of this report to the Chief Constable and the Northern Ireland Policing Board in due course.

**Marie Anderson**  
**Police Ombudsman for Northern Ireland**

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# 1. THE OFFICE OF THE POLICE OMBUDSMAN FOR NORTHERN IRELAND

1.1 The Office of the Police Ombudsman for Northern Ireland (the Office) was established under Part VII of the Police (NI) Act 1998 ('the 1998 Act'). The primary statutory duty of the Police Ombudsman is to secure an efficient, effective and independent police complaints system, and to do so in such manner and to such extent as appears to her to be best calculated to secure the confidence of the public and of the police in that system. There have been four Police Ombudsmen since the Office was created in November 2000. The current Police Ombudsman Marie Anderson was appointed in July 2019.

1.2 The Office of the Police Ombudsman is situated in Belfast and provides a continuous service 24 hours daily to the people and police of Northern Ireland. Staff are employed by, and seconded to, the Police Ombudsman in accordance with Schedule 3 of the 1998 Act.

1.3 The Police Ombudsman has jurisdiction in respect of complaints from members of the public about officers of the following organisations exercising police powers when operating in Northern Ireland:

- The Police Service of Northern Ireland including designated civilians;
- The Belfast Harbour Police;
- The Belfast International Airport Police;
- The Ministry of Defence Police;
- The National Crime Agency (when operating in Northern Ireland);
- 'Serious' complaints regarding Mutual Aid police officers from Great Britain; and
- 'Serious' complaints regarding certain Home Office employees (Immigration officers, designated customs officials and custom revenue officials).

The investigation of serious complaints about Mutual Aid police and Home Office officers exercising enforcement functions<sup>1</sup> in Northern Ireland is regulated by statutory agreements under section 60 of the 1998 Act entered into by the Ombudsman and relevant constabularies or UK Government Departments . The operation of these legal agreements raises complex cross jurisdictional issues and a cross jurisdictional working group has been established of which the Police Ombudsman and her staff are members.

1.4 In addition to investigating complaints about police conduct from members of the public, the Chief Constable must refer any matter which appears to him to indicate that conduct of a member of the police force may have resulted in the death of some other person. The Chief Constable may also refer any matter to the Ombudsman which appears to him to indicate that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings and is not the subject of a complaint. The Chief Constable can exercise this discretion where it appears to him to be in the public interest to do so. The Department of Justice, Northern Ireland Policing Board (the Board) and the Director of Public Prosecutions (the Director) also have this power of referral.

1.5 The Police Ombudsman has power to commence an investigation on her own motion where she has not received a complaint and it appears that a police officer may have committed a criminal offence or behaved in a manner that would justify disciplinary proceedings. The Ombudsman may exercise her discretion where she believes it is in the public interest to do so.

1.6 Section 60 A of the 1998 Act was a new power introduced in 2003 which enables the Police Ombudsman to investigate a current policy or practice of the PSNI if it has come to her attention under Part VII of the 1998 Act (as a result of a complaint for instance) and she has reason to believe it is in the public interest to do so.

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<sup>1</sup> Enforcement functions is defined at section 60ZB(4) of the 1998 Act and includes, powers of entry, search, seizure of property, arrest and detention as well as examination of information

1.7 Having investigated a matter under Part VII of the 1998 Act, and determined that a criminal offence may have been committed, the Police Ombudsman is required to send a copy of the investigation report to the Director, together with such recommendations as appear to her to be appropriate. Where a complaint is not a serious one and the Ombudsman determines that a criminal offence may not have been committed the Ombudsman may determine that mediation is appropriate. If the Director decides not to initiate criminal proceedings or where those proceedings have been concluded, the Ombudsman must consider the question of disciplinary proceedings. The 1998 Act requires the Ombudsman to send to the relevant disciplinary authority (the Board<sup>2</sup> or Chief Constable) a memorandum setting out her recommendations and the reasons for same. No disciplinary proceedings may be brought before the relevant disciplinary authority receives the Ombudsman's memorandum.

1.8 Section 61 provides for a number of statutory reports to be made by the Police Ombudsman to the appropriate authority (the Secretary of State or Department of Justice) as follows –

- A general report on the functions of the Ombudsman as required by the appropriate authority
- A report on matters that have come to the attention of the Ombudsman on matters of public interest
- An annual report to the Department on the discharge of her functions under the 1998 Act
- A report on the review by the Ombudsman of the 1998 Act (at least every five years)

1.9 The Police Ombudsman may publish a statement as to her actions, decisions and determinations and the reasons for same in relation to the exercise of any of her functions under the 1998 Act (section 62). The Ombudsman uses this provision to publish significant public statements on historical and current investigations as well as the publication of cases studies in annual and thematic reports and in press articles.

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<sup>2</sup> The Board is the relevant disciplinary authority for the Chief Constable and his senior team

1.10 Section 66 of the Police (Northern Ireland) Act 2000 requires the Chief Constable to provide any information that the Ombudsman may require for the purposes of an investigation. The Ombudsman and her staff are prohibited from disclosing information obtained for the purposes of her functions except for certain statutory purposes including the purposes of any civil, criminal or disciplinary proceedings. Any person who discloses this information is guilty of a criminal offence. There is no temporal limit on this obligation. Therefore, former Police Ombudsmen and former staff are bound by this provision.

1.11 In addition to powers to assess, investigate and report on complaints and referrals, the Office provides statistical information to the Board to assist in its role of holding the Chief Constable to account.



## **2. THE RELEVANT PRIMARY AND SECONDARY LEGISLATION**

2.1 The legislation which governs the work of the Police Ombudsman's Office, and which is the subject of this review paper, is Part VII of the 1998 Act. The provisions of this Act have been amended over the past two decades to give additional powers to the Police Ombudsman. The statutory instruments set out below have provided for regulations relating to complaints. There is no consolidated statute bringing this primary and secondary legislation together as a single reference point.

2.2 In addition to common law duties and public law obligations, the Police Ombudsman is governed by a range of legislation. International legal Instruments such as the European Convention of Human Rights (ECHR) and the International Convention on the Rights of the Child (ICRC) apply generally. In particular the following is a list of relevant primary and secondary legislation (as amended where appropriate) which governs the work of the Police Ombudsman and her Office:

### **Primary Legislation**

- Criminal Law Act (Northern Ireland) 1967
- Criminal Appeal Act 1995
- Disability Discrimination Act 1995
- Criminal Procedure and Investigations Act 1996
- Human Rights Act 1998
- Northern Ireland Act 1998
- Police (Northern Ireland) Act 2000

- Regulation of Investigatory Powers Act 2000
- Freedom of Information Act 2000
- Justice (Northern Ireland) Act 2000
- Anti-terrorism, Crime and Security Act 2001
- Criminal Justice and Police Act 2001
- Justice (Northern Ireland) Act 2002
- Proceeds of Crime Act 2002
- Police (Northern Ireland) Act 2003
- Justice (Northern Ireland) Act 2004
- The Serious Organised Crime and Policing Act 2005
- Investigatory Powers Act 2016
- Data Protection Act 2018

## Orders in Council

- The Children's (Northern Ireland) Order 1995
- The Commissioner for Children and Young People (Northern Ireland) Order 2003

- The Police (Northern Ireland) Act 1998 (Modification) Order 2003
- Criminal Justice (Northern Ireland) Order 2004
- Criminal Justice (Northern Ireland) Order 2005
- The Policing (Miscellaneous Provisions) (Northern Ireland) Order 2007
- The Police and Criminal Evidence (application to the Police Ombudsman) Order (Northern Ireland) 2009
- The Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010

## Statutory Rules

- Statutory Rule 1989 No. 1341: The Police and Criminal Evidence Order (Northern Ireland) 1989
- Statutory Rule 2000 No. 314: The Police and Criminal Evidence (Application to Police Ombudsman) Order (Northern Ireland) 2000
- Statutory Rule 2000 No. 315: The Royal Ulster Constabulary (Conduct) Regulations 2000
- Statutory Rule 2000 No. 316: The Royal Ulster Constabulary (Unsatisfactory Performance) Regulations 2000
- Statutory Rule 2000 No. 317: The Royal Ulster Constabulary (Appeals) Regulations 2000

- Statutory Rule 2000 No. 318: The Royal Ulster Constabulary (Complaints etc.) Regulations 2000
- Statutory Rule 2000 No. 319: The Royal Ulster Constabulary (Complaints) (Informal Resolution) Regulations 2000
- Statutory Rule 2000 No. 320: The Royal Ulster Constabulary (Conduct) (Senior Officer) Regulations 2000
- Statutory Rule 2001 No. 184: RUC (Complaints etc) Regulations 2001
- Statutory Rule 2001 No. 369: Police Trainee Regulations (NI) 2001
- Statutory Rule 2003 No. 68: Police Service of Northern Ireland (Conduct) Regulations 2003
- Statutory Rule 2004 No.122: The Police Service of Northern Ireland (Secondment) (Garda Síochána) Regulations 2004
- Statutory Rule 2007 No.130: Police Service of Northern Ireland (Unsatisfactory Performance and Attendance) Regulations 2007
- Statutory Rule 2008 No. 242: Police Powers for Designated Staff (Complaints and Misconduct) Regulations (Northern Ireland) 2008
- Statutory Rule 2016 No. 41: The Police (Conduct) Regulations (Northern Ireland) 2016
- Statutory Rule 2016 No.42: The Police (Performance and Attendance) Regulations (Northern Ireland) 2016
- Statutory Rule 2016 No. 43: The Police Appeals Tribunals Regulations (NI) 2016

### **3. THE PROCESS FOR THE 2020 REVIEW OF PART VII OF THE 1998 ACT**

3.1 The Department of Justice have considered the previous Five Year Reviews under the 1998 Act (in 2007, 2011 and 2018). It is clear from those previous exercises that there has been a lack of consensus on progressing reform of the legislation governing the Office since its inception some twenty years ago. The genesis of the Police Ombudsman legislation is the report of Dr Maurice Hayes on his review of the police complaints system in Northern Ireland. That review was commenced in 1995 and Dr Hayes' report was published in 1997<sup>3</sup>. There are numerous reasons for this lack of progress, including the lack of agreement politically over the Office and its powers and more recently the 2017 suspension of the Northern Ireland Assembly.

3.2 This paper has been prepared by the Police Ombudsman in the twentieth anniversary year of the Office to attempt to advance the legislation in line with developments in police oversight in other jurisdictions and in line with international developments. When the Office of Police Ombudsman was first established, Northern Ireland was at the forefront in terms of police oversight arrangements and now the legislation governing those police oversight arrangements has fallen behind. There has been progress in other jurisdictions on updating police oversight arrangements. A comprehensive review of the Scottish Police Complaints system has been undertaken by Dame Elish Angioloni DBE QC<sup>4</sup>, the former Advocate General for Scotland. In her interim report<sup>5</sup> on the review published in June 2019 she made a number of recommendations to the Scottish government for reform of the Police Investigations & Review Commissioner (PIRC) including a recommendation that PIRC should have power to compel officers to attend within a reasonable time for interview. In the Republic of Ireland a review of the Garda Síochána Ombudsman

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<sup>3</sup> A Police Ombudsman for Northern Ireland : A review of the police complaints system in Northern Ireland by Dr Maurice Hayes, January 1997

<sup>4</sup> All comments made within this document are made in anticipation of Dame Angiolini's Final Report. At the time of drafting this document, Dame Angiolini's final Report has not yet been published but is expected imminently.

<sup>5</sup> Scottish Government, 'Police complaints handling, investigations and misconduct issues: independent review' (2019) <[www.gov.scot/groups/independentpolicingreview](http://www.gov.scot/groups/independentpolicingreview)>

legislation has been undertaken. The reformed legislation will provide for a new agency to investigate Gardaí and their civilian colleagues to be established. In England & Wales in 2014, the Independent Office of Police Conduct (IOPC) was given new powers to investigate complaints about persons contracting with a police force and to compel information. Further, from February 2020 the IOPC has an explicit power to ‘determine’ a complaint.<sup>6</sup>

3.3 As a result of legal challenges during the twenty years of the operation of the Office, there is now a body of jurisprudence relating to the provisions of 1998 Act which affect the police oversight arrangements in Northern Ireland. The Office of the Police Ombudsman is recognised as one of the mechanisms<sup>7</sup> by which the State discharges its obligations under article 2 of the ECHR to have an independent investigation in relation to potential police involvement in a death. The jurisprudence relating to the factors that make for an effective investigation for the purposes of article 2 has developed significantly over the last two decades. There are currently three appeals before the Supreme Court (to be heard in June 2021), involving challenges to the PSNI on the issue of the extent to which the article 2 requirement of an independent investigation can be met by PSNI’s Legacy Investigation Branch (LIB) when examining troubles related deaths. Although that litigation does not involve the Office, the outcome is nevertheless of interest on the question of independence for the purposes of an article 2 investigation. In 2019 the Supreme Court gave judgment in the judicial review brought by Geraldine Finucane (widow of the late Pat Finucane) seeking a public inquiry into her husband’s murder. The Supreme Court was critical of the De Silva inquiry into the murder, finding that it was not an effective article 2 inquiry as De Silva had no power to compel witnesses<sup>8</sup>. This judgment is of significance for the issue of compellability of police officers (both currently serving and retired) and compliance with article 2 of the ECHR.

3.4 On 18 June 2020 the Northern Ireland Court of Appeal gave judgment in the judicial review *Re Hawthorne’s and White’s application*. The judgment outlined in detail the Court of Appeal’s views on the powers of the Police Ombudsman under

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<sup>6</sup>Paragraph 23 of Schedule 2 of the Police Reform Act 2002, as amended by the Crime and Policing Act 2017

<sup>7</sup> *Re Hawthorn and White’s application* [2020] NICA33 at paragraph 50

<sup>8</sup> *Finucane, Re Application for Judicial Review* [2019] UKSC 7 at paragraph 140

the 1998 Act and in particular the question of the role of the Police Ombudsman. The Court held that the principal role of the Police Ombudsman is investigatory and not adjudicative. Further, that when the Ombudsman determines to submit a file to the Public Prosecution Service, appropriate recommendations should be made. A memorandum to the disciplinary authority should indicate whether disciplinary proceedings should be brought in respect of the impugned conduct. The Court was clear that thereafter the only role for the Ombudsman is to communicate the outcome of the proceedings to the complainant.

3.5 The question arose during the proceedings as to whether and in what circumstances the Police Ombudsman could ‘substantiate’ or uphold a complaint. The Court of Appeal held that the Ombudsman could ‘substantiate’ a complaint in relation to matters such as incivility or poor performance. The Court also held that although the Police Ombudsman had no power to make determinations in respect of retired officers it would be open to the Ombudsman to indicate in a public statement what recommendations if any, would have been made and the reasons for this. In its judgment the Court of Appeal made reference to a challenge to the former IPCC by West Yorkshire<sup>9</sup> police. Similar arguments about the inability of the former IPCC (now IOPC) to uphold a complaint were made on behalf of the West Yorkshire police and the English Court of Appeal held there was no power to determine a complaint. As a result of this judgment, the IOPC sought and has now obtained amendments to the Police Complaints and Misconduct regulations and these changes are provided for in the Police and Crime Act 2017.<sup>10</sup> It is proposed that similar amendments are required for this Office.

3.6 As part of this 2020 Review research has been undertaken on a comparison with the legislation governing police complaints elsewhere. Where appropriate, references to legislation underpinning the police complaints system in Scotland and England and Wales has been cited. Locally the Northern Ireland Ombudsman’s legislation was reformed by the former OFMDFM Committee of the Assembly. Its

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8 R (Chief Constable of West Yorkshire) v IPCC [2014] EWCA 1367

9 Amending paragraph 23 of schedule 3 of Police Reform Act 2002 by inserting (5A)(c)

proposals for change were adopted by the Northern Ireland Assembly (the Assembly) in March 2016 and enacted in the Public Services Ombudsman (Northern Ireland) Act 2016.

3.7 Internationally there have been developments in relation to the creation of a new set of principles for the establishment and protection of Ombudsman Institutions. The Venice Principles for the protection and promotion of Ombudsman Institutions were adopted by the Venice Commission at its 118<sup>th</sup> Plenary Session on 15-18 March 2019 and endorsed by the Committee of Ministers' Deputies at Strasbourg on 2 May 2019. The Venice Principles have been adopted by the International Ombudsman Institute (IOI) and its President Peter Tyndall (Irish Ombudsman) has recommended these to members as a framework for establishing new ombudsman schemes and also reviewing existing legislation. They are the equivalent of the Paris Principles by which national human rights institutions are to be judged. In particular the Venice Principles underpin the need for independence of ombudsmen institutions and for the appointment of ombudsmen for a single term with a minimum tenure of seven years. Principle 16 requires that all ombudsmen institutions, regardless of remit and jurisdictional differences, must have 'unfettered access' to information relevant to their investigation. Further the Stockholm Declaration made by European Partners against Corruption in December 2019 underscored the need for members to exchange best practice and also the need for anti-corruption and police oversight bodies to be independent.

3.8 Dr Hayes, in his review report, recommended that the independence of the Police Ombudsman be underscored by its status being that of an Officer of the Legislature. He further recommended that he/she report annually to the legislative body and have the power to make special reports to it when recommendations are not accepted or implemented (paragraph 19.1). In 2017 the IOI published a paper<sup>11</sup> on reform of Ombudsman institutions, recommending a close relationship with the Parliament as opposed to the government or a government department.

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<sup>11</sup>International Ombudsman Institutions, *Developing and Reforming Ombudsman Institutions: An IOI Guide for those undertaking these tasks*, Best Practice Paper, Issue 1 (2017)



3.9 A desktop analysis of each of the former Police Ombudsman's Five Year reviews was undertaken. Each of these reviews have been published and consulted on. However, no progress has been made on the legislative changes proposed. The internal desktop exercise included considering the Assembly debates on the Future of the Police Ombudsman's office and stakeholder responses to earlier five year Reviews.

3.10 As a result of the desktop review, a consultation was commenced in June 2020 seeking the views of complaints and investigation officers based on a detailed questionnaire about the 1998 Act. The response to the internal staff questionnaire was limited. This was in part due to lockdown and social distancing measures implemented in response to the Covid-19 pandemic, meaning that face to face discussion with staff was not possible. However, the small number of responses were detailed and echoed many of the initial reflections on a number of the legislative changes needed to ensure the efficient and effective working of the police complaints system in 2020. The recommendation in this five year review paper reflects (where appropriate) staff comments and the operational challenges of operating existing legislation. A paper on the proposed 2020 Review was endorsed by the Office Senior Management Team (SMT) on 5 August and 4 October 2020 and further changes have focussed on ensuring the recommendations (as far as possible) are future-proof.

3.11 Across the Justice family the impact of lockdown and social distancing measures has highlighted the need to support increased homeworking for staff. This has created opportunities to explore and exploit digital technologies for the obtaining and exchange of evidence in the criminal justice system. The Covid-19 pandemic has highlighted the need for new ways of working including the electronic exchange of witness statements and the use of e signatures. The 1998 Act pre-dates the digital revolution and makes no provision for the sharing of information between the Office, the Board, CJINI and other police oversight bodies in relation to investigations and recommendations which would enhance the efficiency and effectiveness of the police complaints system. GDPR and the Data Protection Act 2018 regulate the sharing of personal information and the need for all information sharing to be lawful.

A lawful basis includes an information sharing gateway between respective justices or other ombudsmen where appropriate and necessary. Since 1998 the complexities of the police regulatory and oversight landscape have increased and with it issues around accountability fatigue for PSNI. Increased information sharing, consultation and joint working is a feature of most modern ombudsmen legislation<sup>12</sup>.

3.12 In May 2020 the Minister for Justice announced a ‘*stock take*’ of arms-length I bodies of the Department in the context of twenty years of the police accountability arrangements and also a decade since the devolution of policing and justice powers to the Assembly. The Police Ombudsman is mindful of the terms of reference for that ‘*stock take*’ exercise and the need to clarify the roles of each of the relevant independent bodies. Discussions are ongoing with these arms-length bodies on the establishment of a forum to ensure that there is no overlap or duplication of resources. Further, there is a need to ensure that, where necessary for each other’s remit’ there is a gateway for information sharing and collaborative working. However, these arrangements ought to be underpinned by legislation.

3.13 For the sustainability of this Office and for the confidence which it engenders in those who provide policing services in Northern Ireland, it is important that there is stakeholder consultation of the contents of this paper and that these views are considered and consulted on by the Department. The recommendations reflect the work of other Police Ombudsmen, particularly Dr Maguire, and are based on the re-emergence of previous themes as a result of experience in dealing with police oversight over the past twenty years. The Ombudsman seeks and obtains feedback on a regular basis from relevant stakeholders which has helped to shape a number of these recommendations, particularly in relation to misconduct and disciplinary matters.

3.14 Investigating the past is a particular challenge. The Office has provided its views on the Stormont House Agreement and the establishment of a Historical Investigations Unit (HIU). The Office currently has more than 440 complaints about

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<sup>12</sup> The Regulatory Reform ( Collaboration etc between Ombudsman) Order 2007, Public Services Ombudsman (Wales) Act 2005, Public Services Ombudsman ( Northern Ireland) Act 2016

Trouble's related cases and continues to receive complaints about these matters. Resources are constrained in this regard and half of the total number of cases are 'pending', meaning the investigation cannot be commenced. Our new corporate plan is based on a transition to a HIU type institution over the next four years. A bid has been made for additional staff for the Historical Investigations Directorate which is presently being considered by the Department.

3.15 The legacy inquest timetable set by the Lord Chief Justice over a five year period has significant resource implications for the Office. The establishment of a new Disclosure Unit in the Police Ombudsman's Office to support the coronial inquests must be underpinned by clear legislative gateways for sharing information with the Coroner.

3.16 Finally, an element which is required in any new legislation and is expected in today's information society is the need for transparency in the Ombudsman reports, recommendations and the PSNI responses. Publication of reports can be a difficult balancing exercise concerning the rights of the public, complainants and police officers. However, the expectations of the public are now for greater transparency. The IOPC publish Impact Reports which are a good example of transparency in measuring the effectiveness of its recommendations to police. The Police Ombudsman in this review is seeking enhanced public reporting powers to increase transparency for the work of the Office. In order to secure effective change in policing practices, strategic recommendations made by the Office ought to be communicated to and monitored by the Board. This will strengthen the Board's role in ensuring accountability for changes in policing policy and practice. Such collaborative working arrangements are best supported by data sharing and joint working between the Board and the Ombudsman's Office.

### **Proposals for Legislative Change**

3.17 The Police Ombudsman recognises the need for external stakeholder consultation on any proposals for legislative change outlined in this Review. The views of other stakeholders are an important part of the process. The timing and the

impact of Covid-19 pandemic has not permitted formal engagement with key stakeholders. This Review will require a bespoke external engagement strategy.

3.18 As with previous Police Ombudsmen Reviews, proposals for legislative change have been divided into two sections. The first section consists of strategic recommendations and is outlined at section 4 of this report. Section 5 of this report outlines all operational recommendations. Where a recommendation is new this has also been highlighted. These suggested changes are considered by the Police Ombudsman as necessary to improve the existing police complaints system and to ensure that the Office keeps apace with local, national and international developments in police oversight and ombudsman legislation.

## **4. STRATEGIC RECOMMENDATIONS**

### **OFFICER OF THE ASSEMBLY**

4.1 In his review of the police complaints system, Dr Maurice Hayes considered the status of the Police Ombudsman. He recommended that the Police Ombudsman (as was the then Northern Ireland Ombudsman) be an Officer of the legislature in order to enhance the independence of the Office. The Venice Principles reference the need for ombudsmen to be wholly independent. The Northern Ireland Public Services Ombudsman is an Officer of the Assembly as is the Comptroller and Auditor General. This is to ensure independence. In practice this would (if enacted) mean increased budgetary independence but also allow for scrutiny of the Office performance and use of resources by the Assembly Audit Committee.

#### ***Recommendation 1***

***That consideration be given to legislation providing that the Police Ombudsman be designated as an Officer of the Assembly.***

(new recommendation)

### **A POLICE OMBUDSMAN ACT**

4.2 The 1998 Act is one of sixteen legal instruments containing provisions relating to the Police Ombudsman's complaints assessment and investigation functions. There is also statutory guidance from the Department relating to complaints and investigations. This complex set of legislative instruments and administrative guidance is challenging for the reader. Investigators and staff can find it challenging to interpret and apply them to the facts of a case. It is considered inappropriate that police complaints regulations in this jurisdiction refers to the RUC given that this organisation is no longer in existence. A Police Ombudsman Act should be considered as the foundation legislation to enable the making of supporting regulations.

### ***Recommendation 2***

***The Police Ombudsman legislation be consolidated into a single Police Ombudsman Act, which is foundation legislation providing for further amendment and the ability to make supporting regulations.***

(new recommendation)

## **CIVILIAN OVERSIGHT**

4.3 There are currently no statutory disqualifications that apply to the appointment of the Police Ombudsman. This position is contrary to the concept of civilian oversight (in Scotland a serving or former constable of the Police Service cannot be appointed as the PIRC)<sup>13</sup>. Other ombudsmen legislation provide for disqualifications for the office holder (for instance there is statutory disqualification from a former solicitor or barrister being appointed as the Legal Ombudsman)<sup>14</sup>. This is to ensure the public's trust and confidence in the relevant oversight arrangements. Similarly, in Northern Ireland, solicitors or barristers who are or have practised law cannot hold office as the Judicial Appointments Ombudsman for Northern Ireland. Consideration should be given to introducing disqualifications for persons who previously served as police officers in PSNI or other forces. The disqualifications should also apply to the appointment of an Interim Ombudsman.

### ***Recommendation 3***

***That the Police Ombudsman legislation provide for disqualifications from holding the position of Police Ombudsman for persons who are or have been serving police officers.***

(new recommendation)

## **APPOINTMENT OF AN INTERIM OMBUDSMAN**

4.4 There is currently no legal basis for the appointment of an interim Police Ombudsman should the incumbent die, become incapacitated or vacate the Office

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<sup>13</sup> Paragraph 2(1)(b) of Schedule 4 of the Police, Public Order and Criminal Justice (Scotland) Act 2006.

<sup>14</sup> Section 122 of the Legal Services Act 2007

before the completion of his/her tenure . This oversight should be rectified as it is an appointment provided for in other ombudsman legislation. (The appointment of an Acting Ombudsman for up to a period of one year is provided for in the Public Services Ombudsman (Northern Ireland) Act 2016).

#### **Recommendation 4**

***That the legislation be amended (i) to provide for the appointment of an interim Police Ombudsman and (ii) the appointment be subject to similar disqualifications as for the appointment of the Police Ombudsman.***

((i) Previously in 2011 and 2018 Reviews and (ii) new recommendation.)

### **DEFINITION OF A COMPLAINT FROM A MEMBER OF THE PUBLIC**

4.5 A complaint can only be accepted by the Police Ombudsman from a member of the public. This does not include a serving or retired police officer should they seek to complain about the conduct of another officer arising in the course of their employment. However, there may be instances where a serving police officer has been affected by another officer's conduct (outside the employment context). In such circumstances the Police Ombudsman will deem the officer to be a 'member of the public'.

4.6 The phrase 'member of the public' is not defined in legislation. However it is explained in the Department of Justice Guidance on Complaints<sup>15</sup> as an individual who is connected to the incident or matter complained of. This definition is in guidance and should be provided for in legislation as many members of the public raise general concerns but have not been affected by the incident or conduct complained of.

#### **Recommendation 5**

***That the legislation should define a member of the public as a person connected to or affected by an incident or the matter complained of, which can include a police officer not acting in his or her capacity as such.***

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<sup>15</sup> Department of Justice, Departmental Guidance: Police Misconduct, Performance and Attendance, and Complaints Procedures (September 2016) page 47.

(new recommendation)

## **EXTENSION OF REMIT TO CIVILIAN SUPPORT STAFF AND THOSE CONTRACTING WITH THE PSNI**

4.7 Currently the Police Ombudsman can investigate complaints about police officers and civilian officers operating in custody suites (CDO). Personnel such as CDOs who fall within the remit of the Police Ombudsman are referred to as 'designated staff'. The Ombudsman is limited in relation to the disciplinary proceedings she may recommend in respect of designated staff by the RUC (Misconduct) Regulations 2016. To provide an effective oversight mechanism, it is essential that the Ombudsman has the same range of powers in respect of designated staff as she has in relation to police officers, in order to circumvent this accountability gap.

4.8 Force Medical Officers (FMO) are not within the remit of the Police Ombudsman. This can present issues in investigations relating to deaths in custody, where such incidents can involve FMOs and other health care professionals operating under contract with Police. The Police Ombudsman requires the power to refer the conduct of FMOs in such circumstances to the appropriate regulatory body. The Ombudsman is aware that unlike other health care professionals, FMOs are not currently within the jurisdiction of the Public Services Ombudsman.

### ***Recommendation 6***

***That the Police Ombudsman legislation be amended to permit the Ombudsman to refer to the conduct of an FMO to the GMC.***

(new recommendation)

4.9 There are former police officers providing services to the Chief Constable who are not under the remit of the Police Ombudsman in respect of complaints about their conduct. These individuals may have entered into contractual arrangements with the Chief Constable to carry out functions on his behalf. This accountability gap



was identified a number of years ago in England and Wales, thereby prompting the enactment of section 135 of the Anti-Social Behaviour, Crime and Policing Act 2014. This provides that a contractor, subcontractor and an employee of a contractor is to be treated as a person serving with the police and their conduct is subject to the oversight of the IPOC. A contractor is identified within the 2014 legislation as a person who has entered into a contract with a local policing body, or a Chief Officer to provide services to a Chief Officer. The inclusion of similar provisions in new legislation in Northern Ireland would bridge the accountability gap for those persons (not serving members of a UK police force) who are conducting investigations on behalf of the Chief Constable.

***Recommendation 7***

***That those relevant civilians or other individuals acting on behalf of the Chief Constable or providing services to him in a contractual relationship can be the subject of a complaint or referral to the Police Ombudsman and investigation by her of that person's actions/conduct.***

(new recommendation)

4.10 Previously both the PSNI and Department have been in discussion to bring more police support staff within the remit of the Police Ombudsman. This is particularly important where those staff are public-facing and can play crucial roles in assisting the Chief Constable in meeting his statutory requirements under section 32 of the Police (NI) Act 2000.

***Recommendation 8***

***That any post which was previously carried out by a police officer, which is now fulfilled by police support staff and which involves contact with members of the public, should be brought within the remit of the Police Ombudsman for Northern Ireland for the purposes of complaints against those personnel and the exercise of the powers and duties under Part VII of the Police (Northern Ireland) Act 1998.***

(Previously in 2007,2011 and 2018 Reviews)

## ALTERNATIVE RESOLUTION OF A COMPLAINT

4.11 Section 53(1) of the 1998 Act requires that the Police Ombudsman

*“shall consider whether the complaint is suitable for informal resolution and for that purpose may make such investigations as he thinks fit.*

S. 53(2) of the 1998 Act states that

*“A complaint is not suitable for informal resolution unless –*

*(a) the complainant gives his consent; and*

*(b) it is not a serious complaint.*

4.12 Informal resolution is conducted by the police and it is generally agreed that, for those complainants who agree to informal resolution, the process is working well. There are however a significant number of complainants who, having approached the Police Ombudsman with a complaint, do not think it appropriate for the PSNI to resolve the complaint. However, alternative resolution of complaints can be ‘win win’ for police and complainants, avoiding the necessity for formal investigation.

4.13 The title “informal resolution” is generally agreed by Police Ombudsman staff to be inappropriate. It is perceived that this phrase suggests that category of complaint will receive a lesser investigative service. Modern ombudsman practice places an emphasis on resolving complaints as a more efficient use of constrained resources.

### **Recommendation 9**

***That the Police Ombudsman may recommend any action which she considers appropriate with a view to resolving a complaint; and that the Police Ombudsman may recommend any action in addition to or instead of investigating a complaint.***

(new recommendation)

## **DISCRETION OF THE POLICE OMBUDSMAN TO INVESTIGATE**

4.14 The Police Ombudsmen currently must investigate all complaints about the conduct of police officers in Northern Ireland. These complaints can include allegations that police officers have been guilty of criminality or misconduct as well as complaints about unfair treatment, poor performance or incivility. However not all public complaints proceed to formal investigation. It can be challenging to explain to complainants why their complaint does not warrant further investigation. This often leads to discontent and a customer complaint. Consideration ought to be given to a statutory discretion for the Ombudsman to decide whether or not to begin, continue or discontinue an investigation.

There are circumstances where it may not in the public interest to investigate a complaint such as:

- Where an investigation is disproportionate to the outcome sought by the complainant;
- Where no reasonably practical outcome can be achieved by an investigation; or
- Where the complaint is vexatious or ill-founded.

4.15 The Police Ombudsman legislation is silent on the purposes of an investigation. In the interests of an efficient and effective police complaints system clarity is needed so as to capture the assessment of complaints. A decision on an investigation can include deciding whether a matter warrants investigation or should be the subject of alternative resolution (informal resolution or mediation).

4.16 There is currently a requirement that if informal resolution fails then the Police Ombudsman “shall” investigate. There are other occasions on which it is inappropriate to continue with an investigation. For example: the complainant unreasonably failed to engage with the informal resolution process but did not withdraw from it; where there are irreconcilable differences between the

complainant's account of an incident and that of the officer; there are no independent witnesses; or there are no investigative opportunities.

#### **Recommendation 10**

**That the Police Ombudsman legislation provides clarification on the purposes of an investigation, which are - to ascertain whether the matter properly**

**warrants investigation and the allegations contained in a complaint are in substance true.**

(New recommendation)

#### ***Recommendation 11***

***That the Police Ombudsman legislation should provide a discretion for the Ombudsman to determine whether to begin, continue or discontinue an investigation in circumstances where the Police Ombudsman considers it is in the public interest to do so. These circumstances can include where it is not proportionate to investigate a complaint further, where there is no reasonably practical outcome to be achieved and where the complaint is vexatious or ill-founded.***

(New recommendation)

#### ***Recommendation 12***

***That section 54 of the 1998 Act should be amended to give the Police Ombudsman discretion to decide whether a complaint which has been the subject of a failed Alternative Resolution should be further investigated. In such cases there will be a new closure category detailing the necessity of continuing or discontinuing an investigation. This decision will be made by the Police Ombudsman.***

(Previously in 2007,2011 and 2018 Reviews)

## **MEDIATION**

4.17 Mediation is a form of alternative resolution. Staff who responded to the questionnaire and had used mediation considered it was beneficial. The current legislation which allows the Office to use mediation as one of its functions has been utilised infrequently. The main concern of staff arises from the fact that mediation can only be considered at the conclusion of the investigative process, where the investigation report indicates no criminality by a police officer and the complaint is not a serious one.

4.18 In attempts made by some staff to introduce mediation to resolve a complaint under the current legislation, it has proved difficult to succeed as parties are quite often further entrenched in their positions by the conclusion of the investigation. Most mediators will encourage early engagement in an attempt to resolve issues between parties. The current framework should be amended to offer more flexibility in this approach.

### ***Recommendation 13***

***That the legislation be amended to enable the Police Ombudsman to conduct mediation in appropriate circumstances to resolve a complaint, and that there be no requirement to investigate first.***

(Previously in 2007, 2011 and 2018 Reviews)

## **POWERS TO OBTAIN INFORMATION AND DOCUMENTS**

4.19 The Chief Constable and the Board, by virtue of section 66 of the Police (Northern Ireland) Act 2000, must supply the Ombudsman with such information and documents as the Ombudsman may require for the purposes of, or in connection with the exercise of any of her functions.

This is a general and broad obligation upon Police and the Board to provide full disclosure to the Ombudsman and thereafter it is for the Ombudsman to determine the relevance of the said disclosure to her investigations.

4.20 The Venice Principles (Principle 16) recognise that an ombudsman institution must have 'unfettered access' to any evidence or documentation that is **relevant** to an investigation. The obligation within section 66 does not extend beyond the Chief Constable and the Board to any other person, body or agency who may have evidence, information or documents within their possession and control which, in the Ombudsman's opinion, are relevant to her investigation. It is noteworthy that the Coroner has powers to require evidence to be given, documents be produced or anything further required for the purposes of an inquest. The Police Ombudsman's investigation process, like a Coroner's inquest, is inquisitorial in nature and not adversarial. Therefore the need for wide information gathering powers is enhanced.

#### ***Recommendation 14***

***That the legislation is amended to include an obligation upon any person(natural or legal),to produce any documents in their custody or control relevant to an investigation; further that the legislation to require any person to provide for inspection, examination or testing any other thing in their custody or control. These obligations must be met within a reasonable time.***

(new recommendation)

4.21 The Police Ombudsman has no power to compel any witness or suspect (whether a serving or retired police officer) to give a statement of evidence in a reasonable time. These powers are proposed for the PIRC on foot of Dame Elish Agioloni's recent review of the Scottish police complaints legislation referred to previously in this report. The Northern Ireland Public Services Ombudsman (NIPSO) also has power to compel any public body in her jurisdiction or any staff or member or officer of that body; and also to compel any other third party who may have relevant information or documents, to give evidence and produce documents. The NIPSO may certify a matter of obstruction of her investigation as an offence to the High Court and that court may, after inquiry, deal with the person by

way of criminal sanction. It is noteworthy that the Coroner has the power to compel evidence on documents and may fine an individual for failing to comply with a notice to do so under Section 17A Coroner's Act (NI) 1959 as amended by Coroner's and Justice Act 2009. A 2019 Supreme Court judgment<sup>16</sup> held that the De Silva inquiry was not an article 2 compliant inquiry because it had no power to compel witnesses.

### **Recommendation 15**

***That the Police Ombudsman legislation is amended to provide power to compel***

***officers (serving or retired), as witnesses and suspects to attend for interview and produce documents, and to do so within a reasonable time. The interviewees must be required to bring all documentation and records in their possession and control.***

(Recommended in 2007, 2011 and 2018 reviews)

### **Recommendation 16**

***That the High Court be given powers to deal with obstruction by any person of a Police Ombudsman investigation, where such obstruction is in connection with an investigation.***

(new recommendation)

## **DETERMINING A COMPLAINT**

4.22 The Court of Appeal in the Re Hawthorne and White's application held that the Police Ombudsman has no power to determine or substantiate a complaint where criminal or disciplinary proceedings are involved. The Court confirmed the role for the Ombudsman is limited in those circumstances, to communicating the outcome of those proceedings to the complainant. The role of the Ombudsman is an 'investigatory role', with a power to make appropriate recommendations to both the PPS and the disciplinary authority as to the nature of any proceedings. The question arises as to whether a power to determine, such as those provided for to NIPSO, the

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<sup>16</sup>[2019] UKSC 7 para 148

Financial Services Ombudsman and also IOPC, is required. Dr Hayes in his 1997 review report<sup>17</sup> envisaged a role in satisfying a complainant (for instance where their grievance was legitimate) or a police officer (that the allegations in the complaint were not upheld).

4.23 It has been confirmed with the IOPC legal advisor that the IOPC do not 'uphold' complaints that are to be the subject of criminal or misconduct proceedings. When those proceedings are completed the role is limited to communication of the outcome of those proceedings. As referenced at paragraph 3.5 above, the Police and Crime Act 2017 provided new powers for the IOPC to make determinations 'on any other matter'. In those cases where the threshold has not been met for criminal or misconduct proceedings, the IOPC can still determine a complaint about a police officer(s). In practice this is a determination on whether the service provided was *acceptable* or *unacceptable*, or the IOPC have not been able to determine whether the service was acceptable.

#### ***Recommendation 17***

***That the legislation be amended to provide for a power to 'determine' a complaint in circumstances where no criminality or misconduct has occurred but the complainant has a legitimate grievance.***

(new recommendation)

## **CONSULTATION AND CO-OPERATION WITH OTHER POLICE OVERSIGHT BODIES AND OMBUDSMEN**

4.24 The Minister's 'stock take' exercise seeks to ensure the efficient and effective operation of the police oversight bodies and to avoid duplication and overlap. If at any time during the consideration of a complaint or the conduct of an investigation the Police Ombudsman forms the view that the matter complained of could be the subject of an investigation or inquiry by another police accountability or oversight body, then the Police Ombudsman ought to have a discretion to consult that body.

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<sup>17</sup> See paragraph 2.4 and 4.1 re satisfaction of a complaint for the officer and the complainant



This can include sharing information, co-operating in the conduct of an investigation (including a joint or parallel investigation) and on the form, content and publication of a report (including a joint report). The bodies concerned can initially be the arms-length bodies responsible for police complaints who should have reciprocal provisions.

### **Recommendation 18**

***That the legislation be amended to include a general provision enabling the Police Ombudsman to consult, co-operate and share information with other police accountability or oversight bodies, arms-length bodies of the Department (the Board, Criminal Justice Inspectorate) and other UK wide police accountability bodies (HMICFRS).Co-operation includes sharing information or conducting an investigation (jointly or otherwise) and the form, content and publication of a report’.***

(new recommendation)

## **CO-OPERATING WITH OTHER OMBUDSMEN**

4.25 Policing is an essential service that is delivered alongside other public services including emergency services such as Fire and Rescue and Ambulance services. Increasingly police officers are dealing with the most vulnerable in our society seeking to prevent them from harming themselves or others. A recent study evidenced that a significant number of PSNI officers’ time is spent in accident and emergency departments assisting members of the public who are injured / distressed. The Covid-19 regulations are public health legislation and were introduced by the Department of Health. The regulations place responsibility for enforcement of the restrictions on police, public health and local government officials.

4.26 The NIPSO is responsible for investigating complaints about Health and Social Care, the Ambulance Service, Public Health Agency and local councils. Like the Police Ombudsman, NIPSO has power to investigate on its own motion any maladministration and injustice in respect of these public bodies.

4.27 In relation to complaints about Home Office officials operating in Northern Ireland, the Police Ombudsman has a limited remit in relation to serious complaints about the exercise of enforcement functions. However, complaints about maladministration and decision making by immigration Home Office officials are within the remit of the Parliamentary and Health Service Ombudsman (PHSO). This cross jurisdictional issue was raised by the Committee for the Administration of Justice recently with this Office. In relation to cross jurisdictional Issues there is no power within ombudsmen legislation to share information about complaints or cases where there are crossover issues for both organisations.

4.28 Given the overlap in complaints from the public between the NIPSO, PHSO and Police Ombudsman jurisdictions, a mutual information sharing provision would increase the effectiveness of the police complaints system so that a complete picture is provided about potential failings by public services.

4.29 Increasingly, complex investigations involve potential failings by multiple public service agencies. The Police Ombudsman is responsible for investigating only complaints about the conduct of police officers. The NIPSO is responsible for investigating all other public services (except PPS). However, the Police Ombudsman has no power to collaborate, share information, or report jointly, on a major incident with NIPSO. It is important that the accountability landscape in Northern Ireland serves the public as the user of public services. This requires closer working between local ombudsman offices to ensure local accountability, including the Prisoner Ombudsman's Office. It is suggested that the following recommendation would address this accountability gap.

**Recommendation19**

***In order to address a complex regulatory landscape the Police Ombudsman should be enabled to consult with, liaise and co-operate with the following Offices where the Police Ombudsman forms the opinion that the matter may be the subject of an investigation or inquiry by that organisation.***

***(i) Northern Ireland Public Services Ombudsman***

***(ii) Parliamentary and Health Service Ombudsman***

***Co-operation includes sharing information relating to a complaint or investigation, the conduct of an investigation and the form, content and publication of a report.***

(new recommendation)

## **THE STATUTORY BAR ON DISCLOSURE OF INFORMATION OBTAINED**

4.30 Section 63 of the 1998 Act prohibits the Ombudsman and her staff from disclosing any information obtained for the purposes of any of her statutory functions with certain exceptions for certain purposes. These include for the purposes of any civil, criminal or disciplinary proceedings. The operation of this statutory bar is important to protect the confidentiality of the information provided to the Ombudsman by any other party. Where any new information sharing arrangements are provided for in new Police Ombudsman legislation, this bar should be amended to reflect any new data sharing obligations with other organisations.

### ***Recommendation 20***

***That the legislation provisions for protecting information obtained for any of the Ombudsman's statutory functions be amended to take account of new data sharing arrangements with other police accountability bodies and ombudsmen.***

(new recommendation)

## **PUBLIC REPORTS AND PROTECTION OF POLICE OMBUDSMAN REPORTS**

4.31 The Police Ombudsman must issue reports on referrals made to her by the Chief Constable, the Board and the Department of Justice under regulation 20 of the

RUC Police Complaints etc Regulations 2000 (the 2000 regulations). However regulation 20 of the 2000 regulations does not extend to a report on a referral made by the Director of Public Prosecutions or the Secretary of State. This is an omission in existing regulations.

**Recommendation 21**

***That the Police Ombudsman legislation be amended to permit reports on referrals from the Director of Public Prosecutions and the Secretary of State.***

(new recommendation)

4.32 Section 61 of the 1998 Act provides for a number of Police Ombudsman reports to the appropriate authority including a report on any functions of the Ombudsman, a report on matters in the public interest and a report on a review of the legislation. There is no general power conferred on the Ombudsman to publish a report. Section 62 of the 1998 Act empowers the Police Ombudsman to make a 'public statement' in respect of those actions, decisions and determinations required under the 1998 Act. Reports on referrals by the Chief Constable, the Board and the Department are not routinely published under section 62 of the 1998 Act by the Office. Case studies on these regulation 20 reports are provided to the media relying on section 62.

4.33 A public statement is not defined in section 62 and has been interpreted by the Office widely as covering a range of publications by the Police Ombudsman which include thematic reports, case summaries and press releases. There is no general power for the Police Ombudsman to publish reports on investigations as provided for in other ombudsman legislation. For instance, section 44 of the Public Services Ombudsman (Northern Ireland) Act 2016 provides for the publication of reports on investigations at the discretion of NIPSO when she considers it is in the public interest to do.

### **Recommendation 22**

***That the Police Ombudsman has a discretion to publish any reports on investigations and the exercise of her functions when it is in the public interest to do so.***

(new recommendation)

4.34 If it is accepted that the Police Ombudsman should have a general discretion to publish any report, it is important that there are safeguards for the protection of the privacy of individuals and the rights and interests of other persons. These safeguards are provided in Article 8 (right to privacy) of ECHR. There are also the requirements of natural justice and procedural fairness. The Court of Appeal (paragraph 56) of the *Re Hawthorne and White* judgment emphasised that when making public statements there is a need to respect the privacy of individuals and meet the requirements of procedural fairness.

### **Recommendation 23**

***That if Police Ombudsman legislation is amended to provide a general power to publish reports, the Ombudsman ought to be required also to take account of the rights and interests of the complainant, police officer(s) and any other person when publishing a report.***

(new recommendation)

## **PROCEDURAL FAIRNESS**

4.35 Procedural fairness is required throughout the complaints assessment, investigation and reporting process. Currently officers are served with a formal notice of the allegations outlined in a complaint by Police Ombudsman staff, as soon as practicable after a complaint has been accepted (as provided for in the 2016 regulations). This notification of the details of a complaint to the subject officer complained about should be a statutory requirement in any new primary legislation.

#### **Recommendation 24**

**That the legislation be amended to include a provision that requires the Police Ombudsman to give any individual who is the subject of allegations in a complaint or investigation an opportunity to comment on any allegations.**

(new recommendation)

4.36 The need for procedural fairness in the production of a public report/statement was clarified in the decision by Mr Justice McCloskey (as he then was) in the case of *Re Hawthorne & White*<sup>18</sup> in the court of first instance. If the Police Ombudsman is provided with a general power to publish any report on an investigation, then procedural fairness requirements include the following:

- i. An individual must be given advance notice of those aspects of the public report on the investigation that are critical of him/her (either explicit or implicit criticism);
- ii. An individual must be given an opportunity to respond to those matters within a reasonable period of time;
- iii. Their response must be taken into account by the Ombudsman;
- iv. The individual's response should also be accurately transposed into the final public report.

#### **Recommendation 25**

**That the legislation be amended to require the Police Ombudsman to provide any officer criticised (explicitly or implicitly) in a public report with an opportunity to comment on those criticisms within a reasonable time. The Ombudsman will also be required to take into account their response and reflect that response in the public report.**

(new recommendation)

4.37 Currently there is no privilege against defamation proceedings attaching to Police Ombudsman reports or public statements under section 62 of the 1998 Act.

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<sup>18</sup>Hawthorne, *Re Judicial Review* [2018] NIQB 94

**Recommendation 26**

***That all published reports and public statements of the Ombudsman are protected by defamation privilege.***

(new recommendation)

## 5. OPERATIONAL RECOMMENDATIONS

### STATUTORY TIME LIMIT ON RESPONSE TO PONI RECOMMENDATIONS

5.1 Section 139 of the Anti-Social behaviour Crime and Policing Act 2014 makes it compulsory for police in England & Wales to respond to an IOPC recommendation within a statutory timeframe (56 days). There is no similar obligation imposed by statute on the PSNI.

#### *Recommendation 27*

*That the legislation be amended to provide for an obligation on PSNI to respond within a statutory time limit.*

(new recommendation)

### NOTIFICATION BY THE CHIEF CONSTABLE

5.2 The Chief Constable may refer for investigation certain matters to the Police Ombudsman under Sections 55(2) and 55(4) of the Police (Northern Ireland) Act 1998 (the Act). The Chief Constable is required by virtue of Section 55(2) of the 1998 Act to refer to PONI for investigation, any matter which appears to indicate that the conduct of the police may have resulted in the death of a person. In accordance with Section 55(4) of the 1998 Act the Chief Constable may also refer matters that he considers to be in the public interest for PONI to investigate and where it appears that a member of the PSNI may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings.

5.3 Where the Chief Constable does not believe the criteria for a Chief Constable's referral has been met, he will nonetheless **notify** PONI of certain matters. This will enable the Police Ombudsman to consider whether she wishes to commence an own motion investigation under Section 55(6) of the 1998 Act. Matters to be notified to PONI can include:



- (a) Any matter resulting in serious injury to a person as a result of police action;
- (b) Those cases where police have discharged a firearm, including the humane destruction of an animal;
- (c) Sexual offences that may have been committed on duty;
- (d) Any allegation which may cause widespread public concern or attract media attention.

5.4 In 2018/19 the Police Ombudsman has received approximately 100 'notifications', resulting in the commencement of less than ten section 55 (6) investigations each year. The Police Instruction Guidance is appended at Annex B. Currently there is no statutory basis for the PSNI to notify the Police Ombudsman of an incident which does not meet the threshold criteria of a referral.

***Recommendation 28***

***That the Chief Constable be required to notify the Police Ombudsman of a matter, where there is no indication that a member of the police force may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings and the Chief Constable considers it is desirable in the public interest to do so.***

(new recommendation)

## **POLICE DISCIPLINARY PROCEDURES**

5.5 The Police (Conduct) Regulations (Northern Ireland) 2016 (the 2016 Regulations) updated the procedures for the discipline of officers in Northern Ireland to reflect a number of the equivalent regulations in England & Wales. However the Northern Ireland Regulations did not implement fully the equivalent reforms in England & Wales. For instance, all police disciplinary hearings are held in private at PSNI venues. The case is presented to the disciplinary panel by a PSNI officer. The panels have no lay membership. In England & Wales, disciplinary panels are comprised of a legally qualified chair and two members, one from a policing background and the other a lay person. This approach to greater independence in

disciplinary proceedings has been adopted by a number of other professions. For instance, all medical and social care fitness to practice hearings are held in public and the panels are comprised of lay members and have a legally qualified chair.

5.6 The Police Ombudsman considers that adopting a similar approach with an increased lay involvement in panels would increase the public's trust and confidence in the police complaints system. Further, much senior police officer time is spent preparing and attending disciplinary panels in Northern Ireland. Neither the disciplinary panel nor the appeals from the disciplinary panel decision are held in public in Northern Ireland. This is out with arrangements in England & Wales. In relation to a public hearing, the determination to hold a public hearing is a matter that could be left to the discretion of the legally qualified chair as to when it is in the public interest to do so. The Police Ombudsman is mindful of the particular security concerns that pertain to Northern Ireland. Indeed it may well only be in the public interest to hold a public hearing where the matter concerns a senior officer. However, the decision as to whether or not to hold a hearing in public ought to be a matter for the legally qualified chair.

5.7 Currently appeals from disciplinary panels are not held in public and consideration should be given to a discretion for the legally qualified chair of the appeal panel to decide whether or not to hold a hearing in public (in the public interest).

***Recommendation 29***

***That the legislation be amended to provide a new composition for police disciplinary panels including a legally qualified chair, with lay and police representative membership. Where it is deemed by the chair in the police disciplinary and appeals panels that it is in the public interest, the hearing should be held in public.***

(new recommendation)

## **FAST TRACK PROCEDURE**

5.8 The 2016 Regulations together with Part VII of the 1998 Act allow for the fast-tracking of disciplinary proceedings where, from an early stage, it is clear that there is criminality or gross misconduct which will result in an officer being dismissed without delay. These statutory provisions do not permit the Ombudsman to refer such matters to be dealt with under the Fast Track Procedure until the Ombudsman's investigation is complete.

5.9 This anomaly should be rectified as it can lead to different outcomes. For instance, where there is a performance issue, an officer with clear issues could be dismissed earlier than if such a matter was investigated by the Police Ombudsman.

### ***Recommendation 30***

***That the legislation be amended to allow the Police Ombudsman to submit an early written report if the conditions contained in regulation 20(3) of the 2016 Regulations are met.***

(Previously 2018 recommendation)

## **DISCIPLINARY RECOMMENDATIONS AND OUTCOMES**

5.10 There is substantial interest from complainants and the public at large in relation to the recommendations made by the Office for disciplinary action and the action, if any, taken by PSNI in response. To date, the Ombudsman will consider each request for such information on a case-by-case basis. Details of her recommendations may only be made public where she has decided that it is in the public interest to do so. This could be the case in a public report or in a public statement issued under section 62 of the 1998 Act or in a published case study or casework digest.

5.11 In England & Wales every complainant is informed of the nature of the recommendations made by the IOPC and the outcome of any disciplinary proceedings. The Ombudsman seeks the power to disclose full details of all

disciplinary recommendations made by her and the related sanctions or outcomes to the complainant and the public in interests of openness and transparency in this jurisdiction.

***Recommendation 31***

***That the Police Ombudsman legislation be amended to permit the release of details of disciplinary recommendations and the sanctions / outcomes in any such proceedings to the complainant and the general public.***

(Previously 2018 recommendation)

## **WITHDRAWAL OF COMPLAINTS**

5.12 Under regulation 23(1) of the RUC (Complaints etc) Regulations 2000 a complaint can only be withdrawn where:

- (1) The Ombudsman receives from the complainant notification in writing signed by him or by his solicitor or other authorised agent on his behalf to the effect:
  - (a) that he withdraws the complaint, or
  - (b) that he does not wish any further steps to be taken in consequence thereof.

5.13 If a complainant withdraws their complaint verbally and does not confirm this in a letter, then the matter is recorded by the Office as ‘non-cooperation’; this skewing complaints statistics in relation to closures. As a matter of convenience, complainants should be able to withdraw complaints verbally. This may also assist those who have difficulty in writing or where their first language is not English.

***Recommendation 32***

***Regulation 23 of the 2001 Regulations be amended to allow complainants to withdraw complaints verbally, provided that it is formally recorded by the Ombudsman staff who receives the verbal withdrawal.***

(Previously in 2007,2011 and 2018 Reviews)

## VEXATIOUS AND ILL FOUNDED ALLEGATIONS

5.14 Regulation 25(1) of the RUC (Complaints etc) Regulations 2000 provides that:

*Complaints which are anonymous, repetitious, vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints or incapable of investigation*

25. - (1) Where the Ombudsman is of the opinion-

(a) that a complaint is an anonymous or a repetitious one within the meaning of paragraph 2 or 3 of the Schedule or that a complaint is vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints or that it is not reasonably practicable to complete the investigation of a complaint, within the meaning of paragraph 4 thereof; and

(c) that, in all the circumstances, the requirements of Part VII of the Act to the extent that they have not already been satisfied should be dispensed with, the Ombudsman may dispense with the said requirements as respects the complaint.

Where an allegation is ill-founded (after the Ombudsman has conducted preliminary inquiries), the matter may require investigation under the 1998 Act as it could not properly be described as 'vexatious, oppressive or otherwise an abuse of the procedures for dealing with complaints.'

5.15 The Police Federation has raised its concerns about vexatious complaints with the Police Ombudsman. A vexatious complaint in certain circumstances could be the subject of a criminal prosecution for perverting the course of justice. It is difficult to prove that a matter is vexatious or oppressive in practice. Therefore a definition of a vexatious complaint would be necessary for Police Ombudsman investigators to decide when a complaint is vexatious.

### ***Recommendation 33***

***That regulation 25(1) of the RUC (Complaints etc) Regulations 2000 be amended to allow the Police Ombudsman to dispense with the requirements of the 1998 Act where a complaint is determined to be ill-founded.***

(Previously 2018 recommendation)

### ***Recommendation 34***

***That definitions of vexatious and oppressive complaints be provided for in legislation.***

(new recommendation)

## **ADMINISTRATIVE ACCOUNTABILITY**

5.16 Dr Maurice Hayes in his 1997 Review of the police complaints system in Northern Ireland recommended that the Police Ombudsman be in the jurisdiction of the Northern Ireland Ombudsman in respect of complaints of maladministration. The Police Ombudsman has informed the Minister of Justice of her intention to consult with NIPSO and to seek legislative amendment to the Public Services Ombudsman Act (Northern Ireland) 2016 (the 2016 Act) in schedule 3 to that Act. This is to ensure that all complaints about service failure or maladministration on the part of her and her staff are investigated by NIPSO. This will provide for accountability for the administrative functions of the Office only. It will not be a route to appeal a decision on a complaint or investigation made by the Ombudsman and her staff.

If this amendment is not made under the 2016 Act it can be made as a consequential amendment in any new legislation in respect of the Office.

### ***Recommendation 35***

***That, subject to consultation with NIPSO, the Police Ombudsman be added to schedule 3 of Public Services Ombudsman (Northern Ireland) Act 2016 as a listed authority for complaints in respect of her administrative functions.***

(new recommendation)

## **Appendix A – 2018 Recommendations**

### **Recommendation 1**

***That the legislation no legal basis for the appointment of an interim Police Ombudsman should the incumbent die, become incapacitated or vacate the Office. This oversight should be rectified.***

### **Recommendation 2**

***That the title of the process currently referred to as “informal resolution” in section 53 of the Police (NI) Act 1998 should be changed to “Local Resolution”.***

### **Recommendation 3**

***That section 54 of the Police (NI) Act should be amended to give the Police Ombudsman discretion to decide whether a complaint which has been the subject of a failed Local Resolution should be further investigated, and that in such cases a new closure category “Failed Local Resolution, further investigation not necessary” be introduced. The necessity of further investigation should be determined by the Police Ombudsman.***

### **Recommendation 4**

***That the Police (NI) Act 1998 be amended to enable the Police Ombudsman to conduct mediation in appropriate circumstances, and that there be no requirement to investigate first.***

### **Recommendation 5**

***That any post which was previously carried out by a police officer, which is now fulfilled by police support staff and which involves contact with members of the public, should be brought within the remit of the Police Ombudsman for Northern Ireland for the purposes of complaints against those personnel and the exercise of the powers and duties under Part VII of the Police (Northern Ireland) Act 1998.***

**Recommendation 6**

***The current legislative provisions should be amended to allow the Police Ombudsman for Northern Ireland to submit an early written report if the conditions contained in regulation 20(3) of the 2016 Regulations are met.***

**Recommendation 7**

***That legislation is enacted to provide certainty over how officers who operate cross-jurisdictionally within the UK are overseen between the respective oversight bodies in the UK.***

**Recommendation 8**

***That the 1998 Act be amended to make it clear that the Ombudsman is permitted to provide details of his disciplinary recommendations and the outcomes of any such proceedings to the complainant and general public.***

**Recommendation 9**

***That the current review in relation to Coronial legislation takes account of the Police Ombudsman's Office and the necessary changes are made to reflect the Ombudsman's remit.***

**Recommendation 10**

***That the requirement to serve a notice under Regulation 6 of the Royal Ulster Constabulary (Complaints etc.) Regulations 2000 on officers is repealed but that the Regulation 6 notices continue to be served on the PSNI to notify them of the existence of the complaint, so that all complaints are captured for statistical analysis.***

**Recommendation 11**

***That the Police Ombudsman should specifically be empowered by statute to compel the attendance for interview of both witness and suspect officers.***



**Recommendation 12**

***That the Police Ombudsman be given a power to compel former police officers to submit to witness interview, answer questions and provide all relevant documentation to him, which is within their possession, custody, power or control when he is conducting criminal investigations involving grave or exceptional matters.***

**Recommendation 13**

***Regulation 23 of the 2001 Regulations be amended to allow complainants to withdraw complaints verbally, provided that it is formally recorded as such by the Ombudsman staff who receives the verbal withdrawal.***

**Recommendation 14**

***That regulation 25(1) of the RUC (Complaints etc) Regulations 2000 be amended to allow the Police Ombudsman to dispense with the requirements of the 1998 Act where a complaint is determined to be ill-founded.***

**Recommendation 15**

***That the PACE (Application to Police Ombudsman) Order (NI) 2009 be amended to reflect the roles of officers in the Ombudsman's Office.***

**Recommendation 16**

***That the following Regulations:***

***Royal Ulster Constabulary (Complaints etc.) Regulations 2000;***

***RUC (Complaints etc) Regulations 2001; and***

***Royal Ulster Constabulary (Complaints) (Informal Resolution) Regulations***

***2000 be consolidated into one set of Regulations:***

***Police (Complaints etc.) Regulations 2019***

## **Appendix B – quote from PSNI Service instruction on ‘Public Complaints and the role of the Police Ombudsman’ of 26 January 2017**

*‘The Chief Constable is required by virtue of Section 55(2) of the Police (NI) Act 1998 to refer to PONI for investigation, any matter which appears to indicate that the conduct of the police may have resulted in the death of a person.*

*In accordance with Section 55(4) of the Police (NI) Act 1998 the Chief Constable may also refer matters that he considers to be in the public interest for PONI to investigate and where it appears that a member of the PSNI may have committed a criminal offence or behaved in a manner which would justify disciplinary proceedings.*

*Where the Chief Constable does not believe the criteria for a Chief Constable’s referral has been met, he will nonetheless notify PONI of certain matters. This will enable the Police Ombudsman to consider whether he wishes to call himself in under Section 55(6) of the Police (NI) Act 1998. The individual circumstances will dictate whether these are notified through the emergency on-call Senior Investigating Officer (SIO) who can be contacted on 07769974977. This number must not be given to members of the public. Matters to be notified to PONI are as follows:*

- (a) Any matter resulting in serious injury to a person as a result of police action. Serious injury is defined as a fracture, damage to an internal organ or impairment of bodily function;*
- (b) Cases where police have discharged a firearm, including the humane destruction of an animal (except in training situations or for negligent discharges within the confines of a police station resulting in no injury to another person);*
- (c) Use of Attenuated Energy Projectiles (AEP) or Taser stun gun;*
- (d) Use of CS Incapacitant Spray on a person under 18 years old;*
- (e) Any sexual offence alleged to have been committed on duty; or*
- (f) Any allegation which may cause widespread public concern or attract media attention.’*